In The

Supreme Court of the United States

October Term 1975

No. 75-1861

GORDON G. PATTERSON, JR.,
Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

On Appeal from the
New York Court of Appeals

MOTION TO DISMISS OR AFFIRM

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BRIEF FOR APPELLEE

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MOTION

Appellee in the above-entitled case moves to dismiss or affirm the judgment of the New York Court of Appeals on the ground that the question presented is so insubstantial as not to need further argument.

QUESTION PRESENTED

Does the New York statute establishing as an affirmative defense to murder that the defendant acted under the influence of extreme emotional disturbance comport with due process?

STATUTES INVOLVED

N.Y. Penal Law §125.25 Murder in the second degree

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; . . .

N.Y. Penal Law §125.20 Manslaughter in the first degree

A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; . . .

N.Y. Penal Law §25.00 Defenses; burden of proof

1. When a "defense," other than an "affirmative defense," defined by statute is raised at trial, the people have the burden of disproving such defense beyond a reasonable doubt.

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

STATEMENT OF THE CASE

Appellant was convicted following a trial by jury of the crime of murder. The facts, as summarized in the court below, are as follows:

> The defendant, Gordon Patterson, and his wife, Roberta, had a highly unstable marital relationship, marked by recurring verbal arguments and physical assaults. As a result of one such incident, Roberta Patterson left her husband and instituted divorce proceedings. She also resumed dating John Northrup, a neighbor to whom she had been engaged prior to her marriage to the defendant. On December 27, 1970, the defendant, carrying a borrowed rifle, went to his father-in-law's residence and observed his wife in a state of semi-undress in John Northrup's presence. Thereupon, he entered the house and shot Northrup twice in the head, killing him. The defendant confessed to the killing and, after a hearing, the confession was held voluntary and was admitted into evidence against him at trial. Defendant's wife, an eyewitness to the crime, testified, over objection of defense counsel, that defendant fired

two shots at the victim from close range. The defense called eleven witnesses, including the defendant, who testified in great detail as to the defendant's life and particularly that period of his life when he was married to Roberta Patterson. The defense at the trial was that the crime, if there was one, was unintentional. This was based on defendant's version of events to the effect that the gun went off accidentally. Defendant also raised the affirmative defense that at the time of the alleged crime, he was acting under the influence of extreme emotional disturbance.

The court's charge to the jury was based on the homicide provisions of the Penal Law (§§125.25 [subd (1)(a)], 125.20 [subd (2)]). The jury was instructed that "[t]he mere fact that the defendant fired a gun and thereby killed John Northrup does not, alone, suffice to establish his guilt of murder. The offense, as here charged, is an intent crime, and the law requires that it be proved beyond a reasonable doubt that the defendant acted intentionally." The People were required to establish beyond a reasonable doubt that the defendant "intended, in firing the gun, to kill either the victim himself or some other human being." To find intent, the jury had to conclude that the defendant had the "conscious objective to cause death and that his act or acts resulted from that conscious objective." The jury was cautioned that they "must not expect or require the defendant to prove to your satisfaction that his acts were done without the intent to kill. Whatever proof he may have attempted, however far he may have gone in an effort to convince you of his innocence or guiltlessness, he is not obliged, he is not obligated to prove anything. It is always the People's burden to prove his guilt, and to prove that he intended to kill in this instance beyond a reasonable doubt."

With respect to the defense of extreme emotional disturbance, the court stated that the point of this evidence was to convince the jury, by a preponderance of the evidence, that "the defendant's apparent intention to cause death, if you should find there was such, was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance." The court did not elaborate on the definition of "extreme emotional disturbance", noting that the words are "self-evident in meaning". However, the court cautioned that "'extreme' precludes mere annoyance or unhappiness or anger, but requires disturbance excessive and violent in its effect upon the defendant experiencing it." As to the burden of proof, the court repeated its earlier instruction that "generally, the burden rests on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse."

Finally, the court instructed the jury that "[t]he fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree * * * *". The Court went on to explain that "[t]his does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person * * * the killing remains a crime, and

remains a homicide, but is punishable in less severe manner than murder." No objection was taken to the above quoted portions of the court's charge.

The jury found the defendant guilty of murder. The Appellate Division unanimously affirmed the judgment of conviction.

* * *

In May 1973, when the Appellate Division affirmed the judgment of conviction, there was no intimation that the homicide provisions might be vulnerable to serious constitutional challenge. In fact, the initial brief filed by appellant in our court did not raise a due process argument. The point was raised for the first time in a supplemental brief prepared after *Mullaney* was handed down. (A1-5)*

The New York Court of Appeals agreed to consider the issue of the constitutionality of the affirmative defense of extreme emotional disturbance even though the defendant had failed to object to the trial court's charge on this point, "[s]ince the error complained of goes to the essential validity of the proceedings conducted below . . . ." (A8). The Court also decided that *Mullaney* should be given retroactive effect enabling the defendant to assert his claim, although his conviction predates the *Mullaney* decision.

In a four-to-three decision, the Court of Appeals upheld the constitutionality of the statute, the majority concluding that "the New York law of homicide differs significantly from the Maine law struck down in *Mullaney*" (A8-9). In separate concurring opinions, Chief Judge Breitel pointed out "the salutary criminological purposes served by the development of

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*Numerical references preceded by "A" are to the Appendix to Appellant's brief.
Numerical references preceded by "RA" are to the Record on Appeal.

affirmative defenses, . . ." and Associate Judge Jones concluded that since "[o]ur Legislature has carefully and thoughtfully revised our State's Penal Law" and "the intelligent use of affirmative defenses makes eminently sound sense in the criminal law today," the statute should not be declared unconstitutional in the absence of more explicit authority than the *Mullaney* decision (A19, A22). The dissenters concluded that "[u]nder *Mullaney*, there is no alternative but to hold [the affirmative defense of extreme emotional disturbance statute] unconstitutional as a violation of the due process provision of the Fourteenth Amendment."

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

A. The Decision By The New York Court Of Appeals In *People* v. *Patterson*, Upholding The Constitutionality Of The Affirmative Defense To Murder Of Extreme Emotional Disturbance, Was Rendered In Accordance With This Court's Decisions In *Mullaney* v. *Wilbur*, *In Re Winship* And *Leland* v. *Oregon* And Presents No Substantial Federal Question.

1. The Basis Of The Decision Below Was Construction Of A State Statute.

The decision by the New York Court of Appeals in the instant case involved the construction of a state statute whose constitutionality was challenged on the basis of this Court's decision in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). The court below examined the *Mullaney* decision in detail before arriving at its determination that, consistent with *Mullaney*, New York's affirmative defense to murder of extreme emotional disturbance does not violate due process. The Court of Appeals decision was consistent with its prior decision in *People* v. *Laietta*, 30 N.Y.2d 68 (1972), *cert. denied*, 407 U.S. 923 (1972), upholding the

constitutionality of New York's affirmative defense of entrapment.

It is well settled that if the sole basis for a state court's decision is one of statutory construction, "the case cannot be the subject of either appeal or certiorari." Stern and Gressman, *Supreme Court Practice*, pp. 86-87 (4th ed. 1969). It is equally well settled, as noted by this Court in the *Mullaney* decision *supra* at 691, "that state courts are the ultimate expositors of state law . . . and that we are bound by their construction except in extreme circumstances. . . ." See *Winters* v. *New York*, 333 U.S. 507 (1948) and *Murdock* v. *City of Memphis*, 20 U.S. 590 (1875). In the instant case, the construction given New York's affirmative defense statute by the Court of Appeals necessarily supports its constitutionality, inasmuch as the statute does not place any burden upon a defendant to disprove an element of the crime of murder but rather merely requires that a defendant prove a mitigating circumstance in explanation of an element, to warrant conviction for a lesser crime than the People's proof would otherwise call for.

2. The Respective Statutes Of Maine And New York Are Materially Different.

New York "has always defined murder and manslaughter as separate and distinct offenses with punishments varying to fit the degree of the crime." (A11). Maine, however, has defined one generic category of felonious homicide allowing mitigation only in the form of punishment. See *Mullaney supra* at 690-91. Under the Maine statute, the facts of intent are relevant only to punishment, whereas in New York, *intent is an element of the crime of homicide which must be proved by the prosecution beyond a reasonable doubt.* (A16), *Mullaney supra* at 690-91). New York, unlike Maine, does not imply malice from the act of killing but instead requires the prosecution to prove that the defendant intended to effect death (A12). Moreover the New York affirmative defense of extreme emotional disturbance does

not require, as does the Maine defense of heat of passion on sudden provocation, that the defendant have reached a point of "hot blood." Under the New York statute, "it may be that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore." (A16-17).

3. The Respective Jury Instructions In *Mullaney* v. *Wilbur* And *Patterson* v. *New York* Are Materially Different.

The fundamental differences between the Maine and New York statutes are most dramatically illustrated by the differing instructions in the *Mullaney* and *Patterson* cases. In *Mullaney*, the trial court charged the jury that (a) malice aforethought was an essential and indispensable element of the crime of murder without which the homicide would be manslaughter; (b) malice aforethought was to be conclusively implied from an intentional and unlawful homicide unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation; and, (c) malice aforethought and heat of passion were two inconsistent things and by proving the latter the defendant would negate the former. See *Mullaney supra* at 686-87. In the instant case, the trial court charged the jury that (a) murder is an intent crime and the prosecution must prove beyond a reasonable doubt that the defendant intended to kill the victim or some other human being; (b) to find intent, the jury had to find that the defendant had the conscious objective to cause death and that his acts resulted from that conscious objective; (c) whatever proof the defendant may have offered to convince the jury of his innocence, he was not obliged to prove anything; and, (d) the burden was on the defendant to establish, by a preponderance of the evidence, that his "apparent intention to cause death, if you should find there was such, was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance." (A50-51, 55-56).

These differing jury instructions demonstrate the crucial distinction between the Maine statute invalidated in *Mullaney* and the New York statute subsequently upheld in *Patterson*. In New York the burden of proof is at all times on the prosecution to prove the element of intent, whereas the Maine statute required the defendant to disprove this crucial element of the crime.

4. The Instant Case, Unlike *Mullaney* v. *Wilbur*, Presents No Conflicting Opinions On The Constitutionality Of New York's Statute.

The *Mullaney* case came before the Court with conflicting interpretations of the Maine statute and conflicting rulings on its constitutionality by the United States Court of Appeals for the First Circuit and the Supreme Judicial Court of Maine. See *Wilbur* v. *Mullaney*, 473 F.2d 943 (1st Cir. 1973) and *State* v. *Lafferty*, 309 A.2d 647 (1973). In the instant case, no such conflict between courts of equal jurisdiction exists. Indeed, the constitutionality of another of New York's affirmative defenses has recently been sustained by the United States Court of Appeals for the Second Circuit.

In *Robinson* v. *Warden*, F. Supp. (E.D.N.Y. March 10, 1976), *aff'd*, F.2d (2d Cir. June 10, 1976), the constitutionality of New York Penal Law section 125.25(3), the affirmative defense to felony murder, was challenged pursuant to the *Mullaney* decision as violative of due process. The court found that under that subsection, which adjoins the subsection challenged by the defendant in the instant case, "[t]he prosecutor is not relieved of proving any essential element of the crime of felony murder . . . ." Slip opinion, page 7. The Court rejected the argument "that the mere requirement under the statute that a defendant assert an affirmative defense is violative of the due process clause." *Id.*

The decision in *Robinson* is entirely consistent with the decision in the court below. Both the New York Court of Appeals and the United States Court of Appeals for the Second Circuit agree that the affirmative defenses in New York's Penal Law are distinguishable from the Maine statute declared void in *Mullaney* and are consistent with the due process principles enunciated by this Court in the *Mullaney* decision.

5. The Decision Below Is Fundamentally Consistent With Principles Of Due Process Enunciated By This Court And Post-*Mullaney* Decisions In Other Jurisdictions.

Against this factual and historical background, it is evident that the *Patterson* decision does not conflict with the decision in *Mullaney* v. *Wilbur* and presents no substantial federal question. "[T]he gist of *Mullaney* v. *Wilbur* [is] that the state prove all elements of an offense beyond a reasonable doubt . . . ." *Wilkins* v. *Maryland*, 402 F. Supp. 76, 80 (D.C. Md. 1975). Read together, *Mullaney*, *In re Winship*, 397 U.S. 357 (1970), and *Leland* v. *Oregon*, 343 U.S. 790 (1952) require that an accused may be convicted of a crime only upon proof by the prosecution that the defendant is guilty beyond a reasonable doubt of every element of the crime charged.

These decisions do not and cannot stand for the proposition that the defendant shall never have the burden of proof to establish some mitigating circumstance, in *explanation* of an element, to warrant a conviction for a lesser offense if the defendant be guilty of any crime. As Mr. Justice Cardozo wrote for a unanimous bench in *Morrison* v. *California*, 291 U.S. 82, 88-89 (1934):

> [W]ithin limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at

> least upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

Requiring a defendant to prove by a preponderance of the evidence, that he acted under an extreme emotional disturbance in mitigation of murder, after the prosecution has proved beyond a reasonable doubt all of the elements of murder including intent, places no undue or unjust burden upon the defense. Similar "burdens" have been upheld against due process attacks brought after the *Mullaney* decision.

In *United States ex rel. Castro* v. *Regan*, 525 F.2d 1157 (3d Cir. 1975), the court denied habeas corpus relief to the petitioner who claimed he had been denied due process in his murder prosecution by a jury instruction that, "The law presumes that all unlawful homicides, that is all unlawful killings, are committed with malice unless the lack of malice is affirmatively demonstrated by the evidence." The Third Circuit distinguished *Mullaney* on the ground that malice was an element of intent, which in New Jersey, unlike in Maine, had to be proven beyond a reasonable doubt by the prosecution and could not be presumed absent proof to the contrary. This Court recently declined to hear an appeal from that decision. U.S. , 19 CrL 4067 (1976).

In *James* v. *United States*, D.C., 350 A.2d 748 (1976), the District of Columbia Court of Appeals upheld the constitutionality of a statute which placed the burden of proof upon the defendant to show innocent possession of the implements of a crime. The court emphasized in its decision that "[t]he burden of proof beyond a reasonable doubt of every element of the crime was still on the prosecution." *Id.* at 750. Several jurisdictions have been called upon since *Mullaney* to reconsider the constitutionality of the affirmative defense of insanity. At least three such jurisdictions have reaffirmed the constitutionality of these

statutes. See *Grace* v. *Hopper*, 234 Ga. 669, 217 S.E.2d 267 (1975); *State* v. *Berry*, La., 324 So. 2d 822 (1975); *State* v. *Melvin*, Me., 341 A.2d 376 (1975). The court in *Melvin supra* at 379, fn. 6, could "not find that the rationale of [*Mullaney*] demands the abandonment of our long established rule as to burden of proof of mental disease or defect." Inasmuch as "[t]he purpose of the extreme emotional disturbance defense is to permit the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity . . ." (A16), and this affirmative defense is only a mitigating circumstance and not exculpatory, as is the defense of insanity, this New York statute should pass constitutional muster as readily, if not more so, than the statutes upheld in the above-cited cases and in *Leland* v. *Oregon* by this Court.

6. New York's Affirmative Defense Statutes, Including The One In Controversy, Constitute A Progressive Development In The Criminal Law.

New York's affirmative defense statutes, which pervade the State's Penal Law, represent an evolution of the criminal law that is fundamentally consistent with the due process requirements of the Constitution. As Chief Judge Breitel noted in his concurring opinion below:

> In the absence of affirmative defenses the impulse to legislators, especially in periods of concern about the rise of crime, would be to define particular crimes in unqualifiedly general terms, and leave only to sentence the adjustment between offenses of lesser and greater degree. In times when there is also a retrogressive impulse in legislation to restrain courts by mandatory sentences, the evil would be compounded.
>
> * * *
>
> [T]he appropriate use of affirmative defenses enlarges the ameliorative aspects of a statutory scheme for the punishment of crime, rather than the other way around

> — a shift from primitive mechanical classifications based on the bare anti-social act and its consequences, rather than on the nature of the offender and the conditions which produce some degree of excuse for his conduct, the mark of an advanced criminology (A19-21).

It is respectfully submitted that New York's statutory scheme, which permits juries to adjust offenses of lesser and greater degree by allowing defendants to prove mitigating circumstances, readily satisfies due process and is to be distinguished from the antiquated Maine statute invalidated in *Mullaney*, which embodied the archaic concept of malice aforethought as an element of the crime of murder and placed the burden upon the defendant to disprove it.

B. The Instant Case Presents No Controversy As To The Retroactive Application Of The *Mullaney* Decision.

Inasmuch as the defendant's conviction pre-dated the *Mullaney* decision, retroactive application of that decision is required before he may derive any benefit therefrom. Although this Court has not yet determined to apply *Mullaney* retroactively, the New York Court of Appeals interpreted the *Mullaney* decision so as to require retroactive application (A8). Since, however, the court ultimately determined that New York's affirmative defense of extreme emotional disturbance does not violate due process, the retroactivity issue is moot in this appeal.

Should this Court wish to reach this issue, appellee urges that the *Mullaney* decision not be given retroactive application. Two states have, in fact, declined to extend retroactive application of *Mullaney* in decisions that invalidated their respective affirmative defense statutes. See *Fuentes* v. *State*, Del., 349 A.2d 1 (1975) and *State* v. *Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975). Ironically, these decisions which would be of no avail to this defendant had he been directly affected by them, are cited in support of his position.

In *Hankerson*, *supra* at 591, the court warned:

> Retroactive application of *Mullaney* requiring retrials in homicide cases years old in at least fifteen jurisdictions would, we believe, have on the administration of justice in this country a devastating impact.

CONCLUSION

Wherefore, Appellee Respectfully Submits That The Questions Upon Which This Cause Depend Are So Insubstantial As Not To Need Further Argument, And Appellee Respectfully Moves The Court To Dismiss This Appeal Or, In The Alternative, To Affirm The Judgment Entered In The Cause By The Court Of Appeals Of New York.

Dated: Bath, New York
July, 1976

Respectfully submitted,

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